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Supreme Court of the United States

OCTOBER TERM, 1962

No. 322

ALEXANDER T. SPERRY, *Petitioner*

v.

STATE OF FLORIDA, EX REL. THE FLORIDA BAR

On Writ of Certiorari To The
Supreme Court of the State of Florida

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

For The American Bar Association:

F. TROWBRIDGE VOM BAUR, Washington, D. C.
H. H. PERRY, JR., Albany, Georgia
WAYLAND B. CEDARQUIST, Chicago, Illinois
JONATHAN F. ELLS, Winsted, Connecticut
RAYMOND REISLER, Brooklyn, New York
WARREN H. RESH, Madison, Wisconsin
R. CARLETON SHARRETTS, JR., Baltimore, Maryland
GEORGE H. TURNER, Lincoln, Nebraska
MELVIN F. ADLER, Fort Worth, Texas

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 322

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v.

STATE OF FLORIDA, EX REL. THE FLORIDA BAR

On Writ of Certiorari To The Supreme Court of the State of Florida

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

This brief is filed by the American Bar Association as *amicus curiae*, pursuant to the written consent of Petitioner and Respondent which is on file with the Court.

OPINION BELOW

The opinion of the Supreme Court of the State of Florida (R. 51-68) is reported at 140 So. 2d 587.

QUESTIONS PRESENTED

In 1928 Petitioner, a non-lawyer, was "recognized" by the Commissioner of Patents as "a person representing applicants or other parties before his office."

In 1958, after residing in several other jurisdictions, he moved to Tampa, Florida. There he proceeded to "hold himself out to the public as authorized to engage in the practice of law in the patent field" (R. 2), to give opinions as to patentability and infringement of patents, and to prepare patent applications and licenses, acts in Florida which, the Court below held, constitute the practice of law. Petitioner now claims that, by virtue of having been "recognized" by the Patent Office in Washington, D. C., he has a federal license to practice patent and trademark law in Florida, and to perform nearly all the acts enjoined by the Florida Supreme Court.

The questions presented are:

1. Did Congress attempt to authorize the Commissioner of Patents to authorize the Petitioner to practice patent and trademark law in Florida by virtue of the provisions of section 487 of the Revised Statutes as amended by section 3 of the Act of February 18, 1922, 42 Stat. 390, which authorized the Commissioner to prescribe rules "governing the recognition of agents, attorneys or other persons representing applicants or other parties . . . in the presentation or prosecution of their applications or other business before" the Patent Office, and to "suspend or exclude . . . from further practice before his office any person, agent, or attorney shown" not to meet specified standards of conduct?

2. Did the Commissioner of Patents attempt to authorize Petitioner to practice law relating to patents and trademarks in Florida by virtue of the entry in 1928 of Petitioner's name on a "register" in the Patent Office in Washington, D. C., of "all persons entitled to

represent applicants before the Patent Office in the presentation and prosecution of applicants for patents"?

3. If the statute and action of the Commissioner could be construed to amount to an attempted authorization to Petitioner to practice law relating to patents and trademarks in Florida, would the statute then be constitutional as a proper delegation of legislative power, in view of the fact that (a) the subject of authorization of the practice of law is not even mentioned as the subject of delegation, and (b) there is a complete absence of standards in the statute as to when, how or whether the Commissioner should authorize anyone to practice law?

4. If the statute and action of the Commissioner could be construed to amount to an attempted authorization to Petitioner to practice patent law in Florida, would the statute then be unconstitutional as an invasion of the province of the judiciary under Article III of the Constitution, the judiciary alone having the power to admit persons to the bar and to disbar, and to define what constitutes the practice of law and to exclude unauthorized persons therefrom?

5. If the statute and action of the Commissioner could be construed to authorize Petitioner to practice law relating to patents in Florida, and the obstacles stated in questions 3 and 4 could be overcome, then should not the statute be accommodated to the decision below, inasmuch as the statute bears no real relation to, and the decision below does not interfere with, the only power concerning patents granted by the States to the Federal government—to protect the exclusive right to a discovery (for "it is only the right to the invention or discovery, the incorporeal right, which the state cannot interfere with" *Webber* v. *Virginia* (1881), 103 U.S. 344, 347, 26 L.Ed. 565)?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS

Section 23, Article V, of the Constitution of the State of Florida, and Section 2, Article II of the Integration Rule of the Supreme Court of Florida, relating to the control of the practice of law in Florida by the Florida Supreme Court, are set forth in Appendix A.

Also set forth in Appendix A are the statutes relating to the "recognition" of persons before the Patent Office, and the regulations of the Commissioner of Patents relating thereto.

THE INTEREST OF THE AMERICAN BAR ASSOCIATION

The American Bar Association, with over 100,000 members throughout the United States, is keenly interested, and has made a very substantial investment of time, energy and money in two related subjects affecting the public interest. These subjects are (1) raising the standards of legal education and the legal profession, and (2) protecting the public from the injury which results when unqualified persons undertake to practice law. The Association has been particularly concerned about this latter subject since 1930 when, as a result of pressure from outside the Association, what is now known as the Standing Committee on Unauthorized Practice of Law of the Association was established. 59 ABA 154.

Unauthorized practice falls into two basic areas, the practice of law by unqualified persons (1) inside the courtroom and (2) outside the courtroom. The first area is no longer a serious problem. But the industrial revolution following the Civil War generated a tremendous increase in the practice of law by unqualified persons *outside* the courtroom, and this is the main

problem area of unauthorized practice today—of which the Petitioner's acts are a symptom.

Since 1930, the movement to prohibit unauthorized practice outside the courtroom has been an accelerating one. The Petitioner, however, seeks to reverse this trend, indeed, to increase the practice of law outside the courtroom by persons not members of the Bar. "Recognized" by the Patent Office in 1928, and moving to Florida in 1958, he now claims that Patent Office "recognition" gives him a Federal license to hold himself out to the citizens of Florida as entitled to practice law relating to patents and trademarks in the State of Florida, even though enjoined by the highest court of that State from doing so without becoming a member of the Florida bar.

Law has traditionally been regarded as a seamless web. That is, each branch and field of the law are connected together by common threads and principles, and have certain relationships to each other. For this reason legal training has always consisted of a general legal education; and from the standpoint of the public, one cannot safely or competently advise in any special field of the law without a knowledge of the relationship of that field to the fabric of the law as a whole.

But Petitioner does not have the qualifications of a lawyer. Accordingly, if he should be permitted to hold himself out to the public as entitled to practice law relating to patents and trademarks, and practice patent and trademark law in Florida, the public would not have the same protection that it would be afforded by a patent lawyer's services. The public would be injured; the practice of law by unqualified persons would be encouraged; and the very substantial expendi-

tures and efforts over the years by this Association to raise the standards of legal education and the quality of legal services rendered to the public would be set back.

In addition, the administration of justice in Florida is at stake. The relief which Petitioner seeks, "to permit one not a lawyer to be engaged in the business of handling legal matters for others," would "thwart the control of the Courts over the practice of law, and irreparably impair the sound administration of justice." Chief Justice Vanderbilt in *Stack* v. *P. G. Garage, Inc.* (1951), 7 N.J. 118, 80 A.2d 545, 547. And see *Theard* v. *United States* (1957), 354 U.S. 278, 1 L. Ed. 2d 1342, 77 S.Ct. 1274.

THE INTEREST OF THE UNITED STATES

In his brief for the United States as Amicus Curiae, the Solicitor General states that "The decision below threatens to interfere with the operation of various departments and agencies of the United States." (Brief, p. 2) We submit that the decision below does not have any such effect. Although the Solicitor General states that the decision below "prohibits such Patent Office practice" (Brief, p. 2) we do not believe this fairly describes the decision below. The decision below expressly disclaimed any intention to interfere with practice before the Patent Office.

In addition, the Solicitor General states, by reference to a Patent Office publication, that "of the 7,544 persons registered to practice before it, 1,801 were not members of any bar and 1,687 were not members of the bar of the State in which they were practicing. Thus 3,488 practitioners would be immediately affected by the ruling in the instant case and others like it, if it

were to be followed. See *Petition of Kearney*, 63 So. 2d 630 (Fla); *Cf State of Wisconsin* v. *Keller*, 16 Wis. 2d 377, 114 N.W. 2d 796, 801." (Brief R. 3).

The statements in the foregoing paragraph are in error for the following reasons:

1. It is common knowledge that, by virtue of the location of the Patent Office, there happens to be a concentration in the District of Columbia of patent practitioners who are not members of the District of Columbia Bar. And Rule 96 of the Rules of the U. S. District Court for the District of Columbia provides specifically that the prohibition against the practice of law by persons not members of the D.C. Bar "shall not apply to practice before other federal Courts or executive departments, Government boards, commissions, or agencies, or to the holding out of the right to practice before such other federal Courts or executive departments or Government boards, commissions or agencies." Thus this Rule permits persons not members of the D.C. Bar to engage, in the District of Columbia, in so-called "administrative practice," including practice before the Patent Office, without being members of the D.C. Bar. Accordingly, the decision below could not presently have the slightest effect on the group of non-lawyer practitioners before the Patent Office located in the District of Columbia.

2. The statement that non-lawyer patent practitioners, not located in Florida, would be "immediately affected by the ruling in the instant case and others like it, if it were followed," is not entirely clear. No non-lawyer practitioner in any state other than Florida would be affected in the slightest unless the Supreme Court of the particular state, after the institution and

conclusion of the necessary litigation, should render a decision similar to the decision below. Even then, such a decision would not interfere with the non-lawyer's right to practice before the Patent Office itself. Moreover, it is noteworthy that over 10 years elapsed between the decision in a very similar case, *Chicago Bar Association* v. *Kellogg* (1949), 338 Ill. App. 618, 88 N.E. 2d 519, and the institution of the instant lawsuit. In addition, the instant lawsuit would never have been brought had not the petitioner moved to Florida in 1958 and then proceeded to hold himself out to the public as entitled to practice law in the patent field in Florida.

3. Finally, as set forth *post*, pp. 16-19, with respect to similar representations made in Petitioner's brief, even if the Florida decision were to be followed in all of the states, the number of practitioners who would be affected—those holding themselves out to practice patent law—would be only a minute fraction of the 3,488 practitioners which the United States claims would be affected.

The Solicitor General also states (p. 3) that "It is worth noting that some of these registered lay practitioners are presently employed in the 'patent sections' of the several Military Services and that they perform duties within the territorial jurisdiction of the several states. If the ruling here reaches them, the national defense establishment will be affected." We do not believe the concern expressed for the "national defense establishment" has substance. So far as we know, no one has ever attempted to prevent an official who is in the Executive Branch of the Government and in the flow of power of the President under Article II of the

Constitution, from performing the duties of his office, on the ground that he was engaged in the unauthorized practice of law. Moreover, no such government official is involved in this case. The statement that "If the ruling here reaches them" is outside the issues, unrealistic conjecture.

STATEMENT OF THE CASE

1. Petitioner's Acts in Florida

Petitioner began work in the field of patents as a patent searcher (R. 8). On January 12, 1928 (R. 8), his name was entered on the "Register" of the Patent Office as a "Patent Attorney," thus becoming "recognized"[1] by the Patent Office under the applicable statutory provision, as a "person representing applicants or other parties before his office". At that time, Petitioner listed himself on the records of the Patent Office as a resident of New York City. The Patent Office records also show that he moved to Washington, D. C., in 1944, and that in 1951 he shifted his residence to California.

In 1958, according to the same records of the Patent Office, Petitioner moved to Florida. He is not a lawyer; and he never became a member of the Florida Bar. Nevertheless, he proceeded to establish an office on the 8th Floor of the First National Bank Building in Tampa, Florida, with "Patent Attorney" advertised on the entrance door of his office. In addition, he caused himself to be listed in the August 1960 Yellow

[1] At that time a candidate for such "recognition" did not have to taken an examination of any kind. Rather he was registered on the basis of affidavits as to his proficiency from those with whom he had worked. For Commissioner Robertson's statement in 1933 of the shortcoming of that practice, see Appendix C, p. C-6.

and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.

§ 32. The Commissioner may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before the Patent Office, any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 31 of this title, or who shall, by word, circular, letter, or advertising, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the Office. The reasons for any such suspension or exclusion shall be duly recorded. The United States District Court for the District of Columbia, under such conditions and upon such proceedings as it by its rules determines, may review the action of the Commissioner upon the petition of the person so refused recognition or so suspended or excluded.

§ 33. Whoever, not being recognized to practice before the Patent Office, holds himself out or permits himself to be held out as so recognized, or as being qualified to prepare or prosecute applications for patent, shall be fined not more that $1,000 for each offense.

Rules of Practice of the United States Patent Office in Patent Cases, 24 F.R. 10332, 37 CFR §§ 1.31, 1.341-1.348.

§ 1.31. Applicants may be represented by an attorney or agent. An applicant for patent may file and prosecute

his own case, or he may be represented by an attorney or agent authorized to practice before the Patent Office in patent cases. The Patent Office cannot aid in the selection of an attorney or agent.

§ 1.341. Registration of attorneys and agents. A register of attorneys and a register of agents are kept in the Patent Office on which are entered the names of all persons recognized as entitled to represent applicants before the Patent Office in the preparation and prosecution of applications for patent. Registration in the Patent Office under the provisions of these rules shall only entitle the persons registered to practice before the Patent Office.

(a) *Attorneys at law.* Any attorney at law in good standing admitted to practice before any United States Court or the highest court of any State or Territory of the United States who fulfills the requirements and complies with the provisions of these rules may be admitted to practice before the Patent Office and have his name entered on the register of attorneys.

(b) *Agents.* Any citizen of the United States not an attorney at law who fulfills the requirements and complies with the provision of these rules may be admitted to practice before the Patent Office and have his name entered on the register of agents.

(c) *Requirements for registration.* No person will be admitted to practice and registered unless he shall apply to the Commissioner of Patents in writing on a prescribed form supplied by the Commissioner and furnish all requested information and material; and shall establish to the satisfaction of the Commissioner that he is of good moral character and of good repute and possessed of the

legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service, and is otherwise competent to advise and assist them in the presentation and prosecution of their applications before the Patent Office. In order that the Commissioner may determine whether a person seeking to have his name placed upon either of the registers has the qualifications specified, satisfactory proof of good moral character and repute, and of sufficient basic training in scientific and technical matters must be submitted and an examination which is held from time to time must be taken and passed. The taking of an examination may be waived in the case of any person who has actively served for four years in the examining corps of the Patent Office.

(d) *Registration of firms.* Any firm, the individual members of which are each registered on the register of attorneys, may have its name entered upon the register of attorneys. Any firm, one of the individual members of which is registered on the register of agents and each of the remaining individual members are registered either on the register of attorneys or the register of agents, may have its name entered on the register of agents. If the membership of the firm is changed, application must be made for registration of the firm as changed.

(e) *Foreign patent attorneys and agents.* Any foreign patent attorney or agent not a resident of the United States who shall file proof to the satisfaction of the Commissioner that he is registered and in good standing before the patent office of the country in which he resides and practices, and is possessed of the qualifications stated

in paragraph (c) of this rule, may be registered on the register of agents as entitled to represent applicants located in such country before the United States Patent Office in the presentation and prosecution of applications: *Provided*, That the patent office of such country allows substantially reciprocal privileges to those admitted to practice before the United States Patent Office. Such registration shall continue only during the period that the conditions specified obtain.

(f) *Government employees.* Officers and employees of the United States who are disqualified by statute (18 U.S.C. 281) from practicing as attorneys or agents in proceedings or other matters before Government departments or agencies, may not be registered, and if any registered attorney or agent becomes such an officer or employee, his name on the register shall be endorsed as inactive during the period of such employment, but officers or employees whose official duties require the preparation and prosecution of applications for patent may be registered (on compliance with these rules) or recognized to practice, to the extent necessary to carry out their official duties.

(g) *Former examiners.* No person who has served in the examining corps of the Patent Office will be registered after termination of his services, nor, if registered before such service, be reinstated, unless he undertakes (1) not to prosecute or aid in any manner in the prosecution of any application pending in any examining division in which he served, on the date he left said division; and (2) not to prepare or prosecute nor to assist in any manner in the preparation of prosecution of any appli-

cation of another filed within two years after the date he left such division, and assigned to such division, without the specific authorization of the Commissioner. Associated and related classes in other divisions may be required to be included in the undertaking or designated classes may be excluded. In case application for registration or reinstatement is made after resignation from the Office, the applicant will not be registered, or reinstated, if he has prepared or prosecuted, or assisted in the preparation or prosecution of any such application as indicated in this paragraph.

(h) *Oath and registration fee.* Before his name may be entered on the register of attorneys or on the register of agents, every applicant for registration must, after his application is approved, subscribe and swear to an oath prescribed by the Commissioner of Patents and pay the prescribed registration fee. (See § 1.21.)

(i) *Committee on Enrollment.* The Commissioner may establish a Committee on Enrollment to receive and act upon applications for registration to practice before the Patent Office, to conduct and supervise the examinations provided for in paragraph (c) of this rule, to maintain the registers and to perform such other duties in connection with enrollment and recognition of attorneys and agents as may be necessary; or such functions may be performed by designated officials of the Patent Office. Any action of such committee or official may be reviewed by the Commissioner.

§ 1.342. Limited recognition. Any person not registered and not entitled to be recognized under § 1.341 as an attorney or agent to represent applicants generally may,

upon a showing of circumstances which render it necessary or justifiable, be recognized by the Commissioner to prosecute as attorney or agent a specified application or applications, but this limited recognition shall not extend further than the application or applications specified.

§ 1.343. Persons not registered or recognized. No person or firm not registered or specifically recognized as provided in § 1.342 will be permitted to prosecute applications of others before the Patent Office.

§ 1.344. Professional conduct. Attorneys and agents appearing before the Patent Office must conform to the standards of ethical and professional conduct generally applicable to attorneys before the courts of the United States.

§ 1.345. Advertising. (a) The use of advertising, circulars, letters, cards, and similar material to solicit patent business, directly or indirectly, is forbidden as unprofessional conduct, and any person engaging in such solicitation, or associated with or employed by others who so solicit, shall be refused recognition to practice before the Patent Office or may be suspended, excluded or disbarred from further practice.

(b) The use of simple professional letterheards, calling cards, or office signs, simple announcements necessitated by opening an office, change of association, or change of address, distributed to clients and friends, and insertion of listings in common form (not display) in a classified telephone or city directory, and listings and professional cards with biographical data in standard professional directories shall not be considered a violation of this rule.

(c) No agent shall, in any material specified in paragraph (b) of this section or in papers filed in the Patent Office, represent himself to be an attorney, solicitor or lawyer.

§ 1.346. **Signature and certificate of attorney.** Every paper filed by an attorney or agent representing an applicant or party to a proceeding in the Patent Office must bear the signature of such attorney or agent, except papers which are required to be signed by the applicant or party in person (such as the application itself and affidavits required of applicants). The signature of an attorney or agent to a paper filed by him, or the filing or presentation of any paper by him, constitutes a certificate that the paper has been read; that its filing is authorized; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. When an applicant or party is represented by a registered firm, such papers must carry the signature of the firm, or the signature of an individual member of the firm or an individual registered attorney or agent employed by the firm and duly authorized to sign on behalf of the firm in addition to the firm name, and the certification constituted by the signing or presentation of the paper shall be a certification by and on behalf of the firm and by the individual.

§ 1.347. **Removing names from registers.** Attorneys, agents, and firms, registered to practice before the Patent Office, should notify the Office of any change of address for entry on the register, by letter separate from any notice of change of address filed in individual applications. The Office may address a letter to any person or

firm on the registers, at the address of which separate notice for the register was last received, for the purpose of ascertaining whether such person or firm desires to remain on the register. The name of any person or firm failing to reply and give the information requested within a time limit specified will be removed from the register, and the names so removed published in the Official Gazette. Any name so removed may be reinstated, either on the register of attorneys or the register of agents, as may be appropriate.

§ 1.348 Suspension or disbarment proceedings. Except as otherwise provided, proceedings for suspension, disbarment, or exclusion from practice are before a Commissioner.

(a) *Investigating and prosecuting officer.* The duties of investigation, preparing charges, collecting and presenting testimony, and presenting a case for suspension, exclusion from practice or disbarment shall be performed by the Solicitor of the Patent Office or, at his direction, by a designated law examiner or other person, and neither the Solicitor nor such law examiner or other person shall participate in any manner in the decision of the case. If, upon investigation of a complaint or other information concerning an attorney or agent, it shall appear to the Solicitor that grounds for suspension, exclusion from practice, or disbarment exist, he shall prepare and forward the necessary notice and statement.

(b) *Notice of proceedings.* Proceedings for suspension or disbarment shall be instituted by the Solicitor by mailing to, or otherwise serving on, the respondent a notice of such proceeding with a statement of the charges against

him, at the same time forwarding a copy to the Commissioner. It shall be the duty of the respondent to answer the charges as specified in paragraph (c) of this rule.

(c) *Answer.* The respondent's answer shall be filed in writing with the Commissioner within thirty days from the time the notice is served on the respondent, or within such extension of time as may be allowed by the Commissioner for good cause shown. The answer shall be under oath. Failure to answer within the time allowed will be taken as an admission of the charges. The respondent in his answer should specifically admit or deny every material allegation of fact in the statement of charges; every allegation not denied shall be deemed admitted, unless the respondent states that he has no knowledge thereof sufficient to form a belief, which statement shall be considered a denial. Any special matters of defense shall be stated affirmatively in the answer. False statements in the answer may be made the basis of supplemental charges.

(d) *Hearing.* (1) Unless the Commissioner finds the answer sufficient to dispose of the charges, he will set the case for hearing before him, notifying the respondent and the Solicitor of the place, day and time of commencement of the hearing. Evidence as to the matters in issue may be submitted at the hearing, the testimony of witnesses being presented orally, under oath and reported.

(2) The hearing may be advanced and continued by the Commissioner, as far as may be deemed convenient and proper.

(3) Depositions for use at the hearing in lieu of personal appearance of witnesses may be taken by either

the Solicitor or the respondent on application to and with the written consent of the Commissioner within such times and under such conditions as the Commissioner may prescribe.

(e) *Hearing officer.* The Commissioner may, in his discretion, delegate the conduct of the hearing to a hearing or trial examiner who shall be the presiding officer and who shall make a recommended decision.

(f) *Administrative Procedure Act.* Proceedings shall be governed, in matters not specifically set forth herein, by the provisions of the Administrative Procedure Act, 60 Stat. 237; 5 U.S.C. 1001-1011, which may be applicable.

Section 2, Article 2, of the Integration Rule of The Florida Bar, 31 F.S.A.

"No person shall engage in any way in the practice of law in this state unless such person is an active member of The Florida Bar, in good standing, except that a practicing attorney of another state, in good standing, who has professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business only, when it is made to appear that he has associated and appearing with him in such business an active member of The Florida Bar."